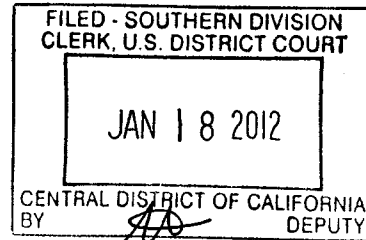


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I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
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DATED: 1/18/12
Denise Vo
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY LEWIS,

Petitioner,

vs.

LARRY SCRIBNER, Warden,

Respondent.

Case No. EDCV 07-0084-PA (RNB)

ORDER ACCEPTING IN PART
FINDINGS AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and all the records and files herein, including the assigned Magistrate Judge's September 28, 2011 Report and Recommendation, petitioner's objections thereto, the Magistrate Judge's October 25, 2011 Superseding Report and Recommendation, petitioner's "Motion for Temporary Stay and Abeyance and Equitable Tolling" filed in response thereto, petitioner's "Supplement to Petitioner's Stay-and-Abeyance Motion," the Magistrate Judge's December 15, 2011 Supplemental Report and Recommendation, and petitioner's objections thereto. Although petitioner did not file objections to the October 25, 2011 Superseding Report and Recommendation, he did file objections to the December 15, 2011 Supplemental Report and Recommendation, and the Court has made a de novo determination of those portions of the Supplemental Report and

1 Recommendation to which objections have been made.

2 In his Superseding Report and Recommendation, the Magistrate Judge found
3 and concluded that petitioner's motion for relief from judgment should be granted in
4 the interest of justice, pursuant to Rule 60(b)(6). Accordingly, the Magistrate Judge
5 recommended the granting of petitioner's Rule 60(b) motion and the vacating of the
6 judgment of dismissal that had been entered herein on April 15, 2008. The Court also
7 recommended that petitioner be required to file an amended petition setting forth all
8 the federal constitutional claims that he desired to pursue herein and that his motion
9 to unseal be denied as premature and unnecessary.

10 Petitioner did not file objections to the Superseding Report and
11 Recommendation. Instead, on November 15, 2011, he filed a document captioned
12 "Motion for Temporary Stay and Abeyance and Equitable Tolling." In response to
13 the Magistrate Judge's November 17, 2011 Minute Order, petitioner subsequently
14 filed a "Supplement to Petitioner's Stay-and-Abeyance Motion" that appeared to set
15 forth two additional claims that petitioner contemplated including in his amended
16 federal habeas petition after he exhausted his state remedies.

17 For purposes of his Supplemental Report and Recommendation, which
18 recommended the denial of petitioner's stay-and-abeyance motion, the Magistrate
19 Judge accepted as true petitioner's representation that he had exhausted his state
20 remedies with respect to the two claims alleged in his original Petition prior to the
21 filing of this action. Accordingly, the Magistrate Judge's determination of
22 petitioner's stay-and-abeyance motion was premised on the assumption that the
23 motion was governed by the stay and abeyance procedure approved in Calderon v.
24 United States Dist. Court (Taylor), 134 F.3d 981, 987-88 (9th Cir.), cert. denied, 525
25 U.S. 920 (1998) and Kelly v. Small, 315 F.3d 1063, 1070 (9th Cir. 2003), overruled
26 on other grounds by Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007), known
27 as the "Kelly procedure." For the reasons explained in his Supplemental Report and
28 Recommendation, the Magistrate Judge found that there was no reason to stay this

1 action to enable petitioner to exhaust his state remedies with respect to the first part
2 of the first of petitioner's two additional claims. The Magistrate Judge further found
3 that both the second part of the first of petitioner's two additional claims and the
4 second of petitioner's two additional claims were premised on facts that differed in
5 both time and type from those underlying the two grounds for relief alleged in the
6 original Petition. Because those claims thus did not relate back to the filing of
7 petitioner's original Petition herein, the Magistrate Judge further found that those
8 claims already were time barred. Thus, there was no reason to stay this action to
9 enable petitioner to exhaust his state remedies with respect to those claims.

10 In his objections to the Supplemental Report and Recommendation, petitioner
11 has restated and embellished on the additional claims that petitioner contemplates
12 including in his amended federal habeas petition after he exhausts his state remedies.
13 While it appears to the Court that some of petitioner's additional claims would not
14 relate back to the filing of the original Petition herein (e.g., petitioner's prosecutorial
15 misconduct claim relating to the empanelment of the jury and petitioner's
16 insufficiency of the evidence claim), it further appears to the Court that some of
17 petitioner's additional claims at least arguably do relate back (e.g., his ineffective
18 assistance of counsel claims relating to the time waivers). However, the Court has
19 concluded that petitioner's stay-and-abeyance motion is not yet ripe for adjudication,
20 and will not be ripe for adjudication until such time as (a) respondent has appeared
21 in the action and been afforded the opportunity to be heard on the issue of whether
22 the two claims alleged in petitioner's original Petition indeed were exhausted prior
23 to the filing of this action, as well as in opposition to the stay-and-abeyance request,
24 and (b) petitioner has been afforded the opportunity to be heard in reply to
25 respondent's opposition (if any).


26 Accordingly, it is hereby ORDERED as follows:

27 1. The Court concurs with and accepts the Magistrate Judge's findings and
28 recommendation with respect to petitioner's motion for relief from judgment. The

1 motion for relief from judgment therefore is GRANTED, and the Judgment entered
2 herein on April 15, 2008 is hereby VACATED.

3 2. The Court declines to accept the Magistrate Judge's findings and
4 recommendation with respect to petitioner's stay-and-abeyance motion. Instead, the
5 matter is referred back to the Magistrate Judge for further proceedings consistent with
6 the Court's conclusion stated above.

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8 DATED: January 13, 2012

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11 PERCY ANDERSON
12 UNITED STATES DISTRICT JUDGE
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